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No. 03-956

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IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA and CONNECTICUT RIVERS COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

—v.—

NANCY WYMAN, in her capacity as Comptroller of the State of Connecticut and as a member of the Connecticut State Employee Campaign Committee, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Brief in Opposition does not seriously contest that the Second Circuit's decision conflicts with (1) *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and other expressive association decisions of this Court; (2) *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), and other viewpoint discrimination decisions of this Court; and (3) this Court's "unconstitutional conditions" cases holding that groups may not be required to forfeit First Amendment rights in order to be eligible to participate in government programs.

Rather, Respondents' principal argument is that this case is controlled by *Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. 788 (1985), and that this Court's decisions in *Dale*, *Hurley*, and other expressive association cases, as well as this Court's unconstitutional conditions cases, do not apply because they do not involve exclusion from a government employee charitable campaign. There is no basis to Respondents' curious position that they are excused from having to comply with the constitutional principles set forth in later cases such as *Dale* and *Rosenberger* because their facts are closer to those of *Cornelius*, an earlier case. In any event, far from supporting the result below, *Cornelius* is just one more Supreme Court case with which the Second Circuit's decision is in conflict.

The issue is thus squarely joined: May a group's exercise of its First Amendment right to control its own membership practices serve as the basis for exclusion from a state charitable campaign in which the group otherwise would have been included?

1. Respondents assert that the Second Circuit's decision does not conflict with *Dale* because "respondents have never tried to prevent the BSA from enforcing its membership or hiring policies." (Op. at 7.) But the rights of expressive association recognized in *Dale* are protected against either direct or indirect interference.

Respondents assert that "BSA fails to cite any part of the *Dale* decision to establish this contention." (Op. at 8.) That is not true. As we noted in the Petition (Pet. at 13), *Dale* recognized that interference with rights of expressive association can "take many forms." 530 U.S. at 648. *Dale* drew on a long line of cases holding that the Constitution can be violated by indirect state interference with expressive association. *E.g.*, *Healy v. James*, 408 U.S. 169, 183-86 (1972) ("the Constitution's protection is not limited to direct interference" with expressive association, but extends to state action "denying rights or privileges" based on association); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461-63 (1958) (required disclosure of membership lists is an unconstitutional burden on associational rights). Moreover, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), did not involve direct state regulation of group membership, but a condition on group expression attached to a parade permit. *See Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) (citing *Healy* and *Patterson* and noting that violation of expressive association can result where government seeks to "impose penalties or withhold benefits" based on exercise of associational rights).

Dale embraced the principles of these cases. *See* 530 U.S. at 648-50 (*Roberts*); *id.* at 653-56 (*Hurley*). It is

Respondents who seek to turn *Dale's* strong *reaffirmation* of freedom of expressive association into a new and unprincipled *limitation* of that right to cases involving direct state compulsion. From *Healy* to *Hurley*, the Court's cases make plain that the freedom of expressive association can be violated by imposition of burdens, penalties, or exclusions. The Second Circuit's decision unquestionably conflicts with this line of cases.

2. Their reliance on *Cornelius* as controlling does not permit Respondents to escape the reach of *Rosenberger* and the other viewpoint discrimination cases because *Cornelius* itself holds that exclusion on the basis of a group's viewpoint is unconstitutional. *Cornelius*, 473 U.S. at 811. As noted in the Petition, this Court has consistently held that a group may not be excluded from a forum or benefit to which it would otherwise be granted access on the basis of its viewpoint, identity, or perspective. (*See* Pet. at 16-19 (collecting cases).) Further, this Court has consistently held that government may not condition an otherwise-available benefit on relinquishment of First Amendment rights. (Pet. 20-22.) "'For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.'" *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 72 (1990) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (citation omitted)). Nothing in *Cornelius* purports to exempt government charitable campaigns from that vital principle of First Amendment law.

Respondents' only answer is to assert that the question whether an exclusion is viewpoint-based is one of *fact* rather than *law*. (Op. at 8.) However, the Second Circuit held, as a matter of law, that exclusion of the Boy Scouts was "not obviously viewpoint discriminatory" because it was based on the Scouts' "conduct, not . . . expression." (22a.) The Second Circuit acknowledged that the Boy Scouts were excluded because of their leadership policies with respect to open homosexuality – policies that are based on, and express, the Scouts' moral viewpoint. (18a.) Yet the court held that Connecticut does not engage in viewpoint discrimination when it applies a facially neutral law to require that expressive associations "pay[] a price" for their leadership policies (26a), because in so doing the State "regulates membership and employment policies as conduct, not as expression" (22a). The state laws at issue in *Dale* and *Hurley* were not enacted with the intent of infringing the speech and associational rights of the Boy Scouts and the South Boston Allied War Veterans. But since they had that effect as applied by state officials to the activities of those organizations, the statutes were unconstitutional as applied. Here, even if Connecticut law on its face is aimed at conduct rather than expression, Respondents elected to apply that law to Boy Scouts' expressive leadership policies, thereby making them pay a price for that expression. The Second Circuit's error in upholding that viewpoint-discriminatory application of Connecticut law is thus sufficient to support reversal.

Accordingly, this Court need not reach the question whether the Second Circuit correctly evaluated the evidence

to support Boy Scouts' claims of selective enforcement and biased procedures.

3. However, were the Court to "conduct an independent examination of the record as a whole," *Hurley*, 515 U.S. at 567, it would find far more evidence of selective enforcement and discriminatory motive than the minimum required to avoid summary judgment.

Connecticut has repeatedly stated that even if it is lawful for campaign participants to discriminate on the basis of religion, sex, race, age, and sexual orientation in their services, membership or employment, it is nevertheless unlawful for Connecticut to support such discrimination. Yet many campaign participants overtly discriminate in the delivery of services, membership, or employment on one or more of these grounds. (*E.g.*, A 353 at 67-68; A 546, A 669; A 569; A 561.) Furthermore, there is substantial evidence of State officials' hostility to Boy Scouts' viewpoint. (*See* Pet. at 6-7.)

The Court need not reach these factual issues. If nothing else, however, the Second Circuit's careless reading of the factual record does not provide grounds for confidence in its legal conclusions.

4. Respondents seek to deny a conflict with *Cuffley v. Mickes*, 208 F.3d 702 (CA8 2000), *cert. denied*, 532 U.S. 903 (2001), claiming that *Cuffley* is distinguishable because the Eighth Circuit found Missouri's reasons for excluding the Klan from its Adopt-a-Highway program to be pretextual. (*See* Op. at 9-10.) While *some* of Missouri's justifications were found to be pretextual, no such finding was made about the reason that is relevant here – that the

Klan's racial restrictions on membership violated state nondiscrimination requirements. The Eighth Circuit held that to exclude the Klan on the ground that its viewpoint-based membership practices were discriminatory would "violate the Klan's freedom of political association" and constitute "an unconstitutional condition on the Klan's participation in the Adopt-A-Highway program." *Cuffley*, 208 F.3d at 708-09. This holding is irreconcilable with the Second Circuit's holding here. (*See* 19a-26a.)

5. As shown in the Petition, the decision below threatens the First Amendment rights of many groups. (Pet. 23-28.) The impact of a concept that organizations may be made to "pay a price" for exercising their First Amendment rights is limited only by the imaginations of government officials hostile to traditional values. As *amici* have noted,

> "The escalating attacks confronting the Boy Scouts are merely a foretaste of what awaits religious organizations unless this decision is corrected. If not, many expressive associations that choose to reflect any controversial views on abortion, female clergy, homosexual marriage, contraceptive medical coverage, and religious affiliation through their membership and hiring policies will risk having to change their messages or face an avalanche of lawsuits."

Brief of *Amici Curiae* The Becket Fund for Religious Liberty, The Center for Public Justice, The Ethics & Religious Liberty Commission of the Southern Baptist Convention, and The Union of Orthodox Jewish

Congregations of America in Support of Petitioners, dated Feb. 5, 2004, at 3-4.

> "The implications of this decision reach far beyond the parties involved in the present litigation . . . . Indeed, permitting this decision to stand would open the door for other governmental action that seeks to advance a political agenda by forcing those who oppose it to relinquish their constitutionally protected views, beliefs, and practices in exchange for a government benefit that was otherwise available. As this case demonstrates, this is particularly troubling for organizations with traditional moral values, such as the Boy Scouts, and for religious organizations, such as those that adhere to the teachings of the Roman Catholic faith."

Brief of *Amicus Curiae* Thomas More Law Center in Support of Petitioners, dated Feb. 2, 2004, at 3-4.

* * *

In short, nothing in the Brief in Opposition undermines the reasons set forth in the Petition for granting review: The decision below presents an important question of whether State government officials may circumvent *Dale* and impose penalties or deprivations on groups like the Boy Scouts if they exercise the rights this Court recognized in *Dale*. The Second Circuit's decision is a roadmap around *Dale* – and the route it proposes conflicts with this Court's viewpoint discrimination and unconstitutional conditions

cases as well. The decision below implicates the First Amendment rights of thousands of private, charitable, and religious groups around the nation and presents a recurring issue on which lower courts are divided.

CONCLUSION

For these reasons and those stated in the Petition, the Petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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